IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-396

CHARLES C. FITZGERALD,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Charles C. Fitzgerald, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on June 14, 1978, in the above entitled cause.

## CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, *infra*, pages 1a-14a is unreported at present.

## JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on June 14, 1978. A timely Petition for Rehearing was filed and denied on July 31, 1978. This Petition for a Writ of Certiorari will be timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

I. Whether the petitioner is entitled to a severance where evidence showed he was a participant in some of the conspiracies and activities but not all?

II. Whether by the strict construction of the Indiana bribery statutes Cornel Leahu, as Superintendent of the East Chicago Sanitary District was a bribeable official?

III. Whether the trial court abused its discretion by disallowing petitioner his right to cross-examine the governments' immunized witness as to witnesses' motives, thereby abridging petitioner's sixth amendments' right?

## STATUTES INVOLVED

Title 18 of the United States Code, Section 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Indiana Code: IC 19-2-14-
IC 19-2-14-32
IC 19-2-14-7
IC 19-2-14-2

Title 35 Art. 1 Chap. 90 Sect. 4 Ind. Rev. Stat.
Title 35 Art. 1 Chap. 90 Sect. 5 Ind. Rev. Stat.
Title 35 Art. 1 Chap. 101 Sect. 9 Ind. Rev. Stat.
Title 35 Art. 1 Chap. 101 Sect. 7 Ind. Rev. Stat.
Title 18 Art. 1 Chap. 2 Sect. 4 Ind. Rev. Stat.

## CONSTITUTION INVOLVED

Indiana Constitution, Art. 13 § 1 provides as follows:

> "No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporations, in excess of such amount, given by such corporations, shall be void: Provided, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense, to such an amount as may be requested in such petition.

## STATEMENT OF THE CASE

The indictment in this cause was returned on September 30, 1976, in ten counts, and named seven defendants, including the petitioner. The indictment is reproduced in the Appendix (18a).[1] Count I charged all seven defendants with conspiracy to commit offenses against the United States in violation of 18 U.S.C., § 371. The offenses alleged to be the objects of the conspiracy were (a) the use of the mails in furtherance of a scheme to defraud the East Chicago Board of Sanitary Commissioners and the citizens of East Chicago and to obtain money and property by means of false and fraudulent representations, in violation of 18 U.S.C.,

[1] "A" refers to pages in the Appendix to this Petition.

§ 1341; and (b) traveling in interstate and foreign commerce and use of the facilities thereof to promote, manage, establish and carry on bribery contrary to Indiana law, in violation of 18 U.S.C., § 1952.

The jury found the defendants Kovach, Hamilton, Schubert, Leahu and petitioner guilty on all the counts submitted to them for consideration. On May 13, 1976, the trial court imposed a sentence of five years each on Counts I through VIII to run concurrently with a $10,000 fine on Count I; sentence subject to 18 U.S.C. § 4205(b)(2).

An appeal was taken to the Court of Appeals for the Seventh Circuit. The conviction was affirmed by an opinion and judgment order, dated June 14, 1978, (A. 1a-15a). A timely Petition for Rehearing was filed and denied on July 31, 1978, (A. 16a).

The trial in this cause took eight weeks and the transcript below has a total of 7,373 pages. The evidence introduced in the total trial is summarized in the allegations of Count I of the Indictment (A. 18a-40a). It is suggested that the allegations of Count I be read at this point, before the rest of this Petition is reviewed. Such a reading will convey a grasp of the whole case, as it was presented.

The Government's evidence tended to establish 10 separate and distinct conspiracies:

> 1. There was an agreement by Hernly, Wetterlin, Hamilton, Schubert and Petitioner to divide the profits from the Big Job and to send money to a corporation in Switzerland for tax avoidance or evasion.
>
> 2. There was an agreement between Hernly, Wetterlin, Hamilton, Kovach, Schubert, Leahu and petitioner that a million dollars would be paid to certain East Chicago officials.

3. There was an agreement between Hernly, Wleklinski and Callahan for payment of money to Callahan and Wleklinski for services that they would not and did not render.

4. There was an agreement between Hernly, Leahu and Elmer Layden to provide a phony performance bond.

5. a. There was an agreement to pay certain expenses of Schubert for home improvements.

b. There was an agreement to pay certain expenses of Hamilton for home improvements.

6. There was an agreement to give Cookie Leahu a horse.

7. There was an agreement to put Hinesley on the payroll for services that were not performed and to pay his phony invoices.

8. There was an agreement to pay phony invoices of Wetterlin which were to be used to pay Hinesley for services not performed.

9. There was an agreement to enter into a partnership called Columbine One so that profits from the Big Job could be invested and/or distributed to Hernly, Petitioner, Hamilton and Schubert.

10. There was an agreement to impede the collection of taxes by all the defendants, except ALFRED KOVACH who is not alleged to have received any income. (A. 18a-54a).

The Government and the court below did not disagree that these 10 conspiracies were demonstrated by the evidence. Rather, they stated that all of the conspiracies were part of the larger complex conspiracy charged in Count I. (A. 18a-40a) (Government's Brief below pp. 35, 37)

There is evidence to show petitioner to have been involved in the agreement to "bribe", the agreement to "divide profits", the agreement to "invest in Columbine

One", and the tax avoidance allegation; however, there is no evidence to show petitioner to be involved in "an agreement between Hernly, Wleklinski and Callahan for payment of money to Callahan and Wleklinski for services that they would not and did not render," nor "an agreement between Hernly, Leahu, and Elmer Layden to provide a phony performance bond," nor "an agreement to pay certain expenses of Schubert and Hamilton for home improvements," nor "an agreement to give Cookie Leahu a horse," nor "to put Hinesley on the payroll for services that were not performed and to pay his phony invoices," nor for "an agreement to pay phony invoices of Wetterlin which were to be used to pay Hinesley for services not performed."

In addition, petitioner argued that his repeated motions for severance should be granted where the evidence showed he was severely prejudiced by the introduction of evidence with which he had little or no connection citing *United States v. Kelly*, 349 F.2d 401 (C.A. 2, 1965).

One of the defendants below, Cornel Leahu, was the Superintendent of the East Chicago Sanitary District, and it was contended that as such he was not a "bribeable official." The Court of Appeals, in its initial opinion of June 14, 1978, of page 2, stated "he was appointed to that position by the mayor of East Chicago," which in fact was totally erroneous and was summarily changed after strenuous objections by this petitioner and others were raised in their petitions for rehearing. No opportunity was granted this, or other, petitioner to argue this important issue in the Petition for Rehearing.

During cross-examination of Mr. Hernly, the unindicted co-conspirator and chief government witness, the following questions were asked, to which the Court sustained government objections:

"Did Mr. Tabbert (Mr. Tabbert was Mr. Hernly's counsel during negotiations with the government for Mr. Hernly's immunity) advise you as to what criminal penalties you were facing?"

"Did you know in 1972 and 1973 what criminal penalties you were facing?"

"Why did you make an agreement with the government?"

"Was the number of years that you could possibly get in prison ever discussed with you?"

The Court then made it abundantly clear that he would sustain objections to any further questions concerning Mr. Hernly's perception of the possible penalties he faced for his conduct. (Tr. 2776-2778).

In answer to this the Court said:

"Hernly testified for eleven days. He was exhaustively cross-examined on his receipt of immunity; subsistence and expense payments from the government; his personal and corporate liability, as well as that of his brothers, the attempts he made to get immunity for his Swiss associates; and his remaining interests in ITAG and BESSI."

## REASONS FOR GRANTING THE WRIT

### I.

The Court is being asked to determine a question of importance in Federal criminal law concerning the law of conspiracy, namely, whether the petitioner is entitled to a severance where evidence showed he was a participant in some of the conspiracies and activities but not all.

This Court has not determined this question, which was decided in *United States v. Kelly*, 349 F.2d 720 (C.A.

2, 1965). It is an important question in that it involves the issue of whether due process requires a severance when a defendant has some connection with an alleged "overall conspiracy" but is severely prejudiced by the introduction of evidence with which he has almost no connection. For a defendant to be so tried under such circumstances jointly with other persons deprives him of a fair trial. In the present case, the jury was not given an opportunity for a fair and impartial determination of petitioner's defense.

Petitioner was confronted at the joint trial with the impossible task of defending against evidence not properly admissible against him concerning matters and transactions with which he was neither charged nor otherwise connected.

The testimony concerning the payment of Wleklinski and Callahan for service not rendered, the payment to Elmer Layden for a bond that was not written, the payment of home improvements for the benefits of Hamilton and Schubert, the purchase of a horse for Cookie Leahu and the agreement to pay Hinesley and Wetterlin for false invoices.

No jury, even after instructions from the Court, could be expected to differentiate those facts applicable to the petitioner and all of the evidence introduced by the Government as to the other defendants. By the time the trial came to an end, the evidence, arguments and instructions could be described as a highly complex maze of cross mirrors from which no exit hall could exist for an innocent defendant.

As Justice Jackson saw it, "In other words, a conspiracy often is proved by evidence that is admissible

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[2] Transcript of the evidence.

only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790, 799 (1949) (Jackson J., concurring).

The majority of convictions in conspiracy cases are based upon circumstantial evidence, and this evidence is often admitted under rather loose standards of relevance. As one Court put it, "Wide latitude is allowed (the prosecution) in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged." *Nye and Nissen v. United States*, 168 F.2d 346, 357 (9th Cir. 1948).

The Supreme Court has offered this explanation:

> "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become inseparable, and conspirators would go free by their very ingenuity." *Blumenthal v. United States*, 322 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed 154, 168 (1947).

Admittedly, the prosecution is confronted with particularly difficult problems in proving conspiracy because persons who join together for a criminal purpose do resort to devious and secret methods; however, in some respects, courts tend to overcompensate the prosecution. Courts are particularly vulnerable to this type of criticism, when the agreement requirement is

confused with the evidence from which it may be inferred. *Davidson v. United States*, 61 F.2d 250 (8th Cir. 1932), and when upon proof of argument other defendants are connected with the conspiracy upon slight additional evidence. *Fox v. United States*, 381 F.2d 125 (9th Cir. 1967).

Thus, as here, when several defendants have been charged as participants in a single conspiracy, they may be required to defend against the charges in a single trial. *Schaffer v. United States*, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 2d 921 (1960) holding the joinder not prejudicial even after dismissal of the conspiracy count. However, several conspiracies may not be joined in a single trial "when the only nexus among them lies in the fact that one man participates in all." *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

A joint trial may also present added disadvantages for the several defendants. For one thing, what would otherwise be rights, individual to each defendant, may become, in effect, group rights which must be exercised jointly by all of the defendants. The most obvious example of this is the statutory right to challenge peremptorily prospective jurors.

The greatest danger, however, is the probability of an individual defendant being convicted may be enhanced by his association through joinder with others. This is particularly true when there is a long, complicated trial involving many defendants where the jury may have great difficulty in keeping the evidence and jury instructions straight as they apply to particular defendants. But even when the alleged conspirators are few in number, the individual defendant "occupies an uneasy seat. There generally will be evidence of wrongdoing by

somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Krulewitch v. United States*, 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790, 799-800 (1949) (Jackson, J., concurring).

As in *Krulewitch*, the petitioner found himself in a position where he was unable to avoid the transference of guilt from his co-defendants to himself with regard to matters unrelated to him. He was severely prejudiced thereby and his motion for severance should have been granted. The decision in this regard is in direct conflict with *United States v. Kelly*, supra.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Criminal law.

## II.

The Court is being asked to determine a question of importance in Federal Criminal law namely, whether by the strict construction of the Indiana bribery statutes Cornel Leahu, as Superintendent of the East Chicago Sanitary District was a bribeable official?

The Board of Sanitary Commissioners and the East Chicago Sanitary District were created under the provisions of IC 19-2-14.[3] Although the enabling act originally applied only to first class cities, it was made

[3] IC Indiana Code.

applicable to second class cities, including the City of East Chicago, by IC 19-2-14-32. The boundaries of a sanitary district are not necessarily congruent with the boundaries of the city included within the sanitary district. IC 19-2-14-7. The Board of Sanitary Commissioners consists of two members appointed by the mayor of East Chicago, and the city civil engineer, who is a member by virtue of his office. The statute nowhere mentions or establishes an office of Superintendent—indeed there need be no such office—as the statute simply authorizes the Board of Sanitary Commissioners to "employ such other engineers, chemists, bacteriologists, surveyors, attorneys, inspectors, clerks, laborers and other employees as it may deem necessary . . ." IC 19-2-14-2.

In Indiana all crimes are statutory and the courts have no power to define crime nor can a court construct a crime which is not prohibited, *Kistler v. State*, 190 Ind. 149, 129 N.E. 625 (1921) and statutes defining criminal offenses must be strictly construed. *Short v. State*, 234 Ind. 17, 122 N.E.2d 82 (1954).

The Indiana Constitution, Art. 13, § 1 prohibits any "political or municipal corporation" in the state of Indiana from becoming indebted to any amount exceeding 2% of the value of taxable property within the corporation. The purpose of creating sanitary districts is admittedly to escape the constitutional limitation upon the indebtedness of a "political or municipal corporation."

Thus in *Archer v. City of Indianapolis*, 233 Ind. 640, 122 N.E.2d 607 (1954), the Court held the Indianapolis Sanitary District not to be a political or municipal corporation, but a "special taxing district."

In its original opinion, the Court of Appeals stated at page 2, "Leahu was the Superintendent of the Board. He

was appointed to that position by the mayor of East Chicago. Leahu gave final approval of the bid award and all changes in the work on the project."

After strenuous objections of petitioners in their respective petitions for rehearing, the Court, without allowing oral argument on same ordered its original opinion amended by deleting from page 2: "He was appointed to that position by the mayor of East Chicago" and deleting "on page 10, the paragraphs which start with 'Appellants contend that because an Indiana legislature did not intend to create . . .'" and "Insert, in the place of the two paragraphs deleted beginning on page 10, the following:

> 'Appellants contend that because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution, Leahu as Superintendent was not an employee of a political subdivision. There is no merit in this contention.
>
> In *Archer v. City of Indianapolis*, 233 Ind 640, 122 N.E.2d 607, 610-611 (1954) the Court held that sanitary district bonds payable out of a special tax did not create indebtedness of the municipality served by the sanitary district. Nevertheless, the Court observed that the sanitary district functioned as an agency of the city. The sanitary district is under the control of a Board whose members are appointed and subject to removal by the mayor. The Board acts in the name of the City when it brings or defends an action and when it issues bonds.
>
> We hold that as an employee of the Board, Leahu was an employee of the City and therefore a bribeable official under Indiana law.'"

This still does not decide the critical issue under focus by petitioners. The Indiana Supreme Court explicitly noted the distinction between the powers and attributes of a special taxing district on the one hand, and a

political or governmental subdivision on the other. Since the Indiana Supreme Court held a "Sanitary District" is not a "political subdivision," the rule of strict construction of penal statutes requires the same interpretation be applied to the Indiana bribery statutes; accordingly, the superintendent of the sanitary district could not then be an "employee of a political subdivision" and therefore, since the first objective was to travel in interstate and foreign commerce and to use facilities of interstate and foreign commerce with intent to promote, manage, establish and carry on a bribery in violation of Indiana law—Counts 1 and 2, the same by strict construction cannot stand.

By failing to apply the rule of strict construction with regard to the Indiana bribery statutes as aforesaid, the decision of the Court below is in direct conflict with the decisions in Circuit Courts of Appeal.

In *United States v. Brown*, 505 F.2d 261 (4th Circ. 1974), a deputy state highway commissioner of West Virginia and others were charged with conspiracy to travel in interstate commerce and to use interstate facilities with intent to carry on unlawful activity, the activity being the giving and receiving of bribes under West Virginia law. Following the defendant's conviction, the West Virginia Supreme Court held that a deputy state highway commissioner was not a bribeable official under West Virginia law because he was not a ministerial officer within the meaning of the West Virginia Statutes. The Fourth Circuit thereupon vacated the judgment of conviction.

The submission to the jury of the Count I conspiracy, in which one of the alleged objects of the conspiracy was a violation of 18 U.S.C. 1952 with its underlying state law bribery violation requires reversal of the defen-

dants' convictions. *United States v. Brecht*, 540 F.2d 45 (2d Cir. 1976), cert. den. ..... U.S. ..... (1976), is exact authority on this point. In *Brecht*, two counts of the indictment charged the defendants with violating 18 U.S.C. § 1952 by carrying out the unlawful activities of larceny by extortion and commercial bribery. The Second Circuit held that the Travel Act does not cover the crime of commercial bribery proscribed by New York law. They noted that the evidence was sufficient to establish the crime of larceny by extortion, but "since the jury may have convicted only on the commercial bribery specifications, we must reverse the convictions on those counts." 540 F.2d 50, n. 10.

A strict construction of the Indiana bribery statutes demonstrates that Cornel Leahu is not a bribeable official. Failure to strictly construe these statutes placed the Court below in direct conflict with other Circuits and violates the due process rights of petitioner.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Criminal law.

The Court is being asked to determine a question of importance in Federal Criminal Law, namely, whether the trial court abused its discretion by disallowing petitioner his right to cross-examine the government's immunized witness as to the witness' motives, thereby abridging petitioner's Sixth Amendment rights?

The government's chief witness was so crucial to its case it was a breach of the Court's discretion to disallow petitioner to cross examine Miles A. Hernly regarding his perception of the possible penalties he faced for his conduct to ascertain whether his "prepared statement"

was motivated by a desire to aid the prosecution and protect only those he, the witness desired to protect.

Hernly's substantive interviews with government agents began on July 24, 1975, and continued throughout August. In September, 1975, Mr. Hernly and his attorney traveled to Switzerland and Germany at the request of the government to obtain records of ITAG. There were further interviews in the fall of 1975 and into the spring of 1976. On April 8, 1976, the formal petition for immunity was filed and granted. Thereafter Hernly appeared before the grand jury and identified a 103 page "Statement of Miles Hernly" which had been prepared for him by the government prosecutors.

Hernly testified that until immunity was formally granted in April, 1976, he had no assurances of immunity, but only expectation that it would be granted.

It is an understatement to say that the testimony of Miles Hernly was crucial to the government's case. Rather, without Hernly, the government had no case. Hernly was an unindicted co-conspirator testifying on behalf of the government under a grant of immunity. The government's case depended upon the jury's acceptance of Hernly's credibility.

A defendant's right to cross-examine fully the witnesses against him is a constitutional right secured under the confrontation clause of the Sixth Amendment. *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218 (1931); *United States v. Mayer*, 556 F.2d 245, 248 (5th Cir. 1977). Moreover, ". . . the exposure of the witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1110 (1974). Where the cross-examination is directed at the key prosecution witness, limiting its

scope "in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error." *Truman v. Wainwright*, 514 F.2d 150, 151 (5th Cir. 1975). This is especially true where a prosecution witness has had continuing and intimate dealings with the prosecution, "so that the possibility exists that his testimony was motivated by a desire to please the prosecution" in order to have some charges dropped, to secure immunity, or to assure lenient sentencing treatment. *United States v. Mayer, supra*, 556 F.2d at 248-249.

Furthermore, contrary to the trial court's opinion, the right to cross-examine a witness about the criminal penalties he avoided by obtaining immunity does not depend upon the objective facts as to what crimes could have been or were in fact charged against him. (Statement of Court, TR 2800-2801) As it relates to the witness' motivation in testifying, the critical question is what the witness believed about the penalties he avoided by testifying under a grant of immunity. *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976); *U.S. v. Mayer, supra*, 556 F.2d at 249. Thus the court was clearly in error in suggesting that the questions were improper because no charges had actually been filed against Hernly, or that the questions would require him to state legal conclusions, or that the quantum of penalties to be imposed for any particular crimes were matters for the court alone. (TR 2800-2801)

In *United States v. Rodriguez*, 439 F.2d 782 (9th Cir. 1971), the appellant's conviction was reversed upon a finding by the Ninth Circuit that cross-examination of his alleged sole accomplice was unduly restricted. The trial court had refused to permit a question as to whether the witness knew the minimum mandatory

sentence he would face if the government elected to prosecute him; and only a single question had been permitted concerning the witness' hope or expectation of leniency.

In *United States v. Benavides*, 549 F.2d 392, 394 (5th Cir. 1977), the Fifth Circuit reversed the appellant's conviction because the cross-examination of the government witness concerning his plea bargain was unduly restricted. The witness was not permitted to answer a question as to his understanding of the maximum penalties he might face; the court intervened and stated that he would set the sentence. As in the present case the defense was not permitted to explore *the witness' understanding* of his plea bargain.

In *United States v. Brown*, 546 F.2d 166 (5th Cir. 1977), the court found error when the trial court sustained an objection after defense counsel had asked the chief government witness, an accomplice, if he had been advised by his attorney of the sentencing recommendation of the probation officer.

Although a trial court had undoubted discretionary authority to limit the scope of cross-examination, that discretion comes into play "only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Mayer, supra*, 556 F.2d 250. Even a slight abridgement of Sixth Amendment rights mandates a reversal of appellants' convictions without a showing of prejudice. *Smith v. State of Illinois*, 390 U.S. 129, 130, 88 S.Ct. 748, 750 (1968).

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide these important questions of Federal Criminal law.

## CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX

# APPENDIX 1

## United States Court of Appeals
### For the Seventh Circuit

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT, and ERNEST HAMILTON,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114—**Phil M. McNagny, Jr.**, *Judge.*

ARGUED APRIL 10, 1978—DECIDED JUNE 14, 1978

Before CUMMINGS and WOOD, *Circuit Judges*, and SOLOMON,* *District Judge.*

SOLOMON, *Judge.* Appellants Fitzgerald, Schubert, Hamilton, Kovach, and Leahu were charged in Count 1 with a conspiracy to use the mails in furtherance of a scheme to defraud the East Chicago, Indiana, Board of Sanitary Commissioners (Board) and the citizens of the East Chicago Sanitary District (District). Other objects

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

of the conspiracy were to obtain money and property through false representations and to use the facilities of interstate and foreign commerce to promote and carry on bribery contrary to Indiana law. Fitzgerald, Schubert, Hamilton, and Leahu were charged in Counts 2 to 6 with separate uses of the mails to further the scheme to defraud. They were charged in Count 8 with conspiracy to defraud the United States by obstructing the Internal Revenue Service (IRS) in the computation, assessment, and collection of taxes. Kovach was also charged with perjury before the grand jury.

After an eight-week jury trial in which none of the appellants testified, the jury convicted all appellants of all charges brought against them. On appeal, they raise a number of issues. We affirm.

## I

This case involves the unlawful taking by public officials, contractors, and others of more than two million dollars ($2,000,000) from a public works project.

At the trial, the government proved that Hamilton and Schubert were the directors of RSH, Inc., an architectural, engineering, and consulting service. RSH was under contract to the Board to design an estimated fifteen million dollar sewer project (the project) to be financed by public bonds. Hamilton and Schubert recommended to the Board which bid to accept and supervised the construction. Leahu was the Superintendent of the Board. He was appointed to that position by the mayor of East Chicago. Leahu gave final approval of the bid award and all changes in the work on the project.

Kovach, a friend of Leahu's, was an East Chicago storeowner with many political connections. He was formerly an assistant to the mayor of East Chicago.

Hernly[1] was the president and director of Hernly Brothers, Inc., a construction company which was

[1] Hernly testified for the government and received immunity.

awarded the bid. Fitzgerald was the director of Fitzgerald and Stutz, Inc., a construction company which formed a joint venture with Hernly Brothers to complete the project.

Wetterlin owned a business which designed and sold engineer control systems. Hinesley was a manufacturers' representative for firms which constructed waste-water treatment equipment.[2]

## *BID DISCUSSIONS*

The bids on the project were due on September 22, 1969. Between June and September, 1969, Hamilton, Schubert, Hernly, Wetterlin, and Fitzgerald met at least four times. They discussed Hernly Brothers' proposed bid and made a number of changes in it. They agreed that each would receive one-fifth of the project's profits, and, in return for their shares, Hamilton and Schubert would recommend that the Board accept Hernly Brothers' bid.

The group also discussed a method to secretly divide the profits and avoid income taxes (the Wetterlin plan). Wetterlin suggested that Hernly Brothers should enter into spurious consulting contracts with a foreign corporation, send money overseas as payments on the contracts, and deduct the payments as business expenses. They would then retrieve the money and divide it, free of income taxes. Hamilton and Schubert later traveled to Europe to investigate its feasibility.

## *PALMER HOUSE MEETING*

Hernly and Wetterlin met with appellants at the Palmer House in Chicago on either September 20 or 21, 1969. This was a day or two before submission of Hernly Brothers' bid. Leahu said that he had called the meeting to "see how $1 million that was needed for East Chicago officials would be handled. . . ."[3]

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[2] Wetterlin entered into a plea agreement, and Hinesley entered a plea of guilty.

[3] What other "East Chicago officials" were involved is unclear. The record demonstrates that Leahu received the money, but not whether he gave any of it to other officials.

Hamilton suggested the Wetterlin plan as a method of hiding a million dollars. Kovach and Leahu discussed the Wetterlin plan privately and then announced that the Wetterlin plan would be used. Appellants agreed that one million dollars would be paid to Leahu for "the East Chicago officials". In return, Hernly Brothers would be awarded the bid on the project.

Hernly was concerned about taxes on the million dollar bribe. He wanted to have another million collected to cover taxes on the first million if the IRS discovered it. Appellants agreed that the Wetterlin plan could be used to hide the second million.

Appellants also agreed to use "change orders" to generate at least the amount necessary for the bribe and tax money. The change orders were to be made in the project specifications, signed by Hamilton or Schubert, which either deleted or added items to the project. Hamilton or Schubert were to inflate the value of the additions and deflate the value of the deletions. This would produce hidden profits.

Hamilton, Schubert, Wetterlin, and Fitzgerald agreed that Hinesley would receive a $200,000 commission, the amount he lost when the parts he was to supply were deleted. Hinesley was to be placed on the Fitzgerald and Stutz payroll and paid through false invoices. Hinesley did no work for this money.

### *BID AWARD AND FRAUDULENT PERFORMANCE BOND*

Hernly Brothers and the other bidders submitted their bids on September 22, 1969. On the following day, Hamilton and Schubert recommended to the Board that Hernly Brothers' bid be accepted. The Board tentatively awarded the contract to Hernly Brothers, on condition that Hernly obtain a suitable performance bond.

Hernly was unable to obtain a performance bond. He told this to Leahu and wanted to withdraw his bid, but he was persuaded by Leahu to let Leahu and Kovach obtain the bond. Leahu and Kovach obtained a blank Underwriters Insurance Company bond and, with

Hamilton's help, they completed it, using forged signatures. The Board accepted the fraudulent bond, and the insurance agent who provided the bond received $143,573.14 for his efforts.

Hernly Brothers was given the final award in early January 1970, and shortly thereafter formed the joint venture with Fitzgerald and Stutz.

*FORMATION OF ITAG*

In January 1970, Hamilton, Fitzgerald, Schubert, Wetterlin, and Hernly went to Switzerland to carry out the Wetterlin plan. They met officials of a Swiss accounting firm, Allgemeine Treuhand (Allgemeine), and agreed that Allgemeine would acquire the stock of Ingenieur Tiefbau A.G. (ITAG), a dormant Swiss corporation. The stock was divided into five equal shares and transferred in trust to Allgemeine. Allgemeine was to enter into consulting, purchase, and rental agreements on behalf of ITAG for minimum payments to ITAG of three million dollars.

Hamilton, Schubert, Wetterlin, Hernly, and Fitzgerald signed a separate agreement which provided that each of them was entitled to an equal share of ITAG stock.

In February 1970, Hernly Brothers contracted with ITAG for ITAG to provide consulting services for $80,000 a month. Project funds were used to pay the fee to ITAG, but ITAG provided no services. In June 1970, Hernly and Schubert contracted with ITAG for the rental of sheet welding equipment at $35,000 a month for twenty months. Some equipment was shipped to East Chicago but never used. Project funds again supplied the rental fee.

From February 1970, until November 1971, Hernly Brothers paid about $2.3 million to ITAG out of project funds generated mainly through the fraudulent use of change orders. The cash was usually carried by hand to Zurich; checks were either hand-carried or mailed.

From February 1970, until June 1971, Hernly, Hamilton, Schubert, Fitzgerald, and Wetterlin re-

trieved from ITAG in Switzerland one million dollars which was paid to Leahu. In November 1971, Hinesley retrieved $35,000 from ITAG, out of which he paid $25,000 to Schubert. In October 1971, in Zurich, Hamilton received an ITAG accounting, and in January and February 1972, Hernly mailed letters to ITAG which stated that Hernly Brothers' intended to pay ITAG $20,000 and $30,000 to complete the contracts. The Swiss connection was shut down in early 1972.

*COLUMBINE I AND DIVISION OF PROFITS*

The net "profit" on the project exceeded six million dollars. Hamilton and Schubert wanted to receive their shares tax-free or at a reduced tax rate and suggested investing the profits in oil properties. In April 1971, Fitzgerald and Stutz and Hernly Brothers formed a joint venture with BESSI, a Denver-based investment firm. The joint venture was called Columbine I, and it was formed to transfer profits from Hernly Brothers to Hamilton and Schubert. Hernly Brothers and Fitzgerald and Stutz (the limited partners) contributed $3.2 million of project profits to BESSI (general partner) for investment for exploring and developing oil producing properties. Forty percent of the profit from the investments was to be paid to Hamilton and Schubert for their one-fifth shares of the sewer project profits.

In January 1972, Hamilton and Schubert sold their interests in Columbine I to BESSI in exchange for promissory notes valued at $1,090,930 each. In December 1972, BESSI filed a petition in bankruptcy. Hamilton and Schubert compromised their claims against it for about $75,000.

Wetterlin did not receive any of his share of the sewer project profits.

*PROGRESS ON THE PROJECT AND ITS COMPLETION*

Hamilton and Schubert authorized five change orders before June 30, 1971, when the project was substantially

completed, and later they authorized a sixth change order. The second and fifth change orders, signed and approved by Hamilton, generated most of the two million dollar bribe and tax money.

After June 30, 1971, except for the sixth change order, Hernly Brothers and Fitzgerald and Stutz did only maintenance work on the project. The sixth change order, completed in August 1973, substituted other work for nineteen uncompleted items. The contractors received no additional money for this work.

## II

## *CONTENTIONS*

One or more of the appellants raise the following specifications of error: (1) there was a fatal variance between the indictment and the evidence in Count 1, where the proof showed a number of minor conspiracies rather than one overall conspiracy as alleged; (2) the statute of limitations ran on Counts 1 through 6; (3) Leahu was not a "bribeable official" under Indiana law; (4) co-conspirators' out-of-court statements were erroneously admitted into evidence; (5) the cross-examination of Hernly was erroneously limited; and (6) appellants were prejudiced because the court misinformed counsel of its action on requested jury instructions.

## III

## *SINGLE CONSPIRACY*

The plan of action and the agreements entered into by Wetterlin and Hernly and all of the appellants at the Palmer House meeting established a basis for the jury to find one overall conspiracy. At that meeting the parties agreed: (1) that Leahu would receive a million dollar bribe in breach of his fiduciary duties to the Board and District; (2) that Hamilton and Schubert would breach their duty to protect the Board's and District's interests in the performance of the project by, among other things, dividing the profits with the general contractor;

and (3) that the Wetterlin plan would be used to hide money and avoid taxes.

This was a complex conspiracy which included minor or subsidiary agreements, each one of which involved some but not all of the conspirators. It is immaterial that each of the appellants did not participate in all the activities or even know all the details of the conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 557-58 (1947); *United States v. Hickey*, 360 F.2d 127, 138 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States v. Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). They are bound as long as the results fall within the common purposes of the conspiracy and appellants knowingly contributed toward its furtherance. *United States v. Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). As in *Blumenthal*, each subsidiary agreement here was a step in the formation of a larger conspiracy with common goals.

## *STATUTE OF LIMITATIONS*

Kovach and Leahu contend that their prosecution is time-barred because they were indicted on September 30, 1976, which was more than five years after the bribery conspiracy had been completed. The other appellants contend that the overt acts within the limitations period relate only to ITAG transactions, BESSI transactions, and the final change order—none of which had "any relationship . . . to the core fraud against the Sanitary District."

These contentions are based on the assumption that there were a number of separate conspiracies or that the objects of the conspiracy were entirely separable and distinct. We have already rejected those contentions.

The applicable statute of limitations for the crimes charged in Counts 1 through 6 is five years. 18 U.S.C. § 3282. There were a number of overt acts which took place within the limitations period. The jury could have reasonably found that any of these acts were in furtherance of the conspiracy. These include:

1. *The continued use of ITAG.* On November 5, 1971, Hinesley, pursuant to an authorization for release of ITAG funds, traveled to Switzerland and received $35,000, $25,000 of which he paid to Schubert. He kept the remaining $10,000 as part of his "commission". Several months later Hernly sent letters to ITAG which terminated the consulting contract.

The Wetterlin plan and the ITAG structure were necessary to hide the money. Without them it would have been difficult to hide or pay the bribe money and the tax money or to share the profits with Hamilton and Schubert. This complicated system of concealment was a part of appellants' agreements from the beginning.

The jury could reasonably conclude that these acts of concealment were "done in furtherance of the *main* criminal objectives of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 405 (1957).

2. *Columbine I.* In 1971 the Columbine I joint venture was formed by Fitzgerald and Stutz and Hernly Brothers with BESSI. This was the vehicle by which Hamilton and Schubert were to receive their shares of the profits. During 1971 and 1972, Hamilton and Schubert received approximately $30,000 from the Columbine I investments. In December 1972, they received about $75,000 in compromise of their bankruptcy claims.

## *LEAHU WAS A "BRIBEABLE OFFICIAL"*

The use of interstate and foreign commerce facilities to carry on bribery in violation of Indiana law was one of the objects of the conspiracy. Appellants contend that they could not have conspired to bribe Leahu because he was not a "bribeable official" under Indiana law. Ind. Code §§ 35-1-90-4, 35-1-101-9 (1971) (repealed 1977). Section 35-1-90-4 made it unlawful to bribe any "employee of a political subdivision of [Indiana]." Section 35-1-101-9 made it unlawful to bribe any person holding "any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana for the purpose of procuring [a] public contract. . . ."

Appellants contend that because an Indiana sanitary district is not a municipal corporation for the purpose of the state constitution's two percent tax limitation provision, it is not a political subdivision under section 35-1-90-4. There is no merit in this contention. Neither is there merit in appellants' contention that Leahu's position as sanitary district superintendent was not a "lucrative office, appointment or agency" within section 35-1-101-9 because sanitary board superintendent is not a "lucrative office or appointment" within the meaning of Art. 2, § 9 of the Indiana Constitution.

The Indiana legislature did not intend to create an entity separate from municipalities when it created sanitary districts. *See Archer v. City of Indianapolis*, 233 Ind. 640, 122 N.E.2d 607, 610-11 (1954). Like the chief of police and other department heads appointed by the mayor, Leahu was a public officer and an employee of the municipality. *See State v. Carey*, 241 Ind. 692, 175 N.E.2d 354 (1961); *Klink v. State ex rel. Budd*, 207 Ind. 628, 194 N.E. 352 (1935); *Archer, supra.* As such, he was a bribeable official under Indiana law.

## *ADMISSION OF CO-CONSPIRATORS' OUT-OF-COURT STATEMENTS*

Appellants contend that out-of-court statements made by Fitzgerald to Price Waterhouse & Co. auditors were improperly admitted.

In 1972, after the formation of Columbine I, BESSI proposed an SEC registration. Price Waterhouse & Co. was requested to make an audit which included a five-year earnings history of Hernly Brothers and Fitzgerald and Stutz. Over appellants' objections, Price Waterhouse employees were permitted to testify about statements made to them by Fitzgerald during the audit.

Price Waterhouse employees testified that Fitzgerald told them that:

1. Legal fees paid under the table to assure there would be no trouble with the municipal bonds were a "cost of doing business";

2. A politician told him where to secure the performance bond;

3. The Columbine I profits distributed to Hamilton and Schubert was a "stupid mistake", having nothing to do with the project;

4. He (Fitzgerald) had no ownership interest in ITAG, and the ITAG contracts were negotiated by unrelated parties;

5. The large profit on the project was generated by service and a machine from ITAG, a good economic situation, and earlier completion than expected; and

6. The project had received engineering services from ITAG.

The court instructed the jury that it could consider this testimony against all defendants named in Count 8, but only against Fitzgerald in Count 1.

Appellants argue that these statements were inadmissible hearsay because they were not made during the course of or in furtherance of the conspiracy. They assert that Fitzgerald made the statements to cover up after the Count 1 and Count 8 conspiracies had achieved their main goals. *Grunewald, supra,* 353 U.S. at 405.

Fitzgerald's statements as they relate to Count 1 were admitted against him only, and the jury was so instructed. The limitation was more than appellants were entitled to because from this and other evidence, the jury was entitled to conclude that they were made in furtherance of the Count 1 conspiracy.

Count 8 charged that appellants (with the exception of Kovach) conspired to defraud the IRS by reporting ITAG payments and personal expenses as business expenses on the 1970, 1971, and 1972 partnership tax returns for the Hernly Brothers-Fitzgerald and Stutz joint venture. In our view, there is a sufficient basis to find Fitzgerald's statements were made in furtherance of this conspiracy.

Nevertheless, even if it was error to admit them, the error was harmless. The existence of the Count 8 con-

spiracy and each conspirator's involvement was established by overwhelming evidence. Fitzgerald's statements added nothing substantial, and their effect was minimal in the light of all of the other evidence. *United States v. Smith*, 550 F.2d 277, 282 (5th Cir. 1977); *United States v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977).

## *LIMITATION ON THE CROSS-EXAMINATION OF HERNLY*

Appellants contend that their sixth amendment confrontation rights were violated because their cross-examination of Hernly was limited.

In September, 1972, Hernly retained an attorney to advise him on his criminal liability from transactions with his co-conspirators.

In July, 1975, the government granted Hernly immunity, and shortly thereafter he was interviewed by Justice Department lawyers.

On cross-examination, Schubert's counsel asked Hernly:

> "Did Mr. Tabbert [the attorney] advise you as to what criminal penalties you were facing?"
>
> "Did you know in 1972 and 1973 what criminal penalties you were facing?"
>
> "Why did you make an agreement with the government?"
>
> "Was the number of years that you could possibly get in prison ever discussed with you?"

The government objected to each question, and each objection was sustained. Appellants contend that this limitation on their cross-examination violated their confrontation rights because they were not allowed to fully demonstrate Hernly's bias.

A defendant may not be deprived of the right of "effective" cross-examination when he is attempting to show bias on the part of a government witness. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). But a trial court has

wide discretion to limit cross-examination, particularly when further cross-examination into the witness' subjective thoughts would not be meaningful because of previous testimony revealing the witness' bias. *Bastone, supra*, 526 F.2d at 981.

The question is whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias. *United States v. Campbell*, 426 F.2d 547, 550 (2d Cir. 1970).

Hernly testified for eleven days. He was exhaustively cross-examined on: his receipt of immunity; subsistence and expense payments from the government; his personal and corporate liability for civil tax assessments and fraud penalties; his tax liability, as well as that of his brothers; the attempts he made to get immunity for his Swiss associates; and his remaining interests in ITAG and BESSI.

The jury had ample information on Hernly's receipt of immunity and the benefits he derived from immunity. The court did not abuse its discretion when it sustained objections to these four questions.

## *MISINFORMING COUNSEL OF COURT'S ACTION ON REQUESTED JURY INSTRUCTIONS*

Appellants contend they were deprived of the opportunity to make effective jury arguments on the statute of limitations issue because the court misinformed them on the instructions it proposed to give on that subject.

The court held three instruction conferences. During the conference held after counsel's arguments to the jury, the court modified its previous position. It informed counsel that it would give Hamilton's requested instruction on concealment and its own instruction on the statute of limitations.

This was a complex eight week trial. There were two conspiracy counts and six substantive counts. Many witnesses testified, and many exhibits were admitted. The court ordered the parties to submit their requested jury instructions no later than one week before the trial. Only the government complied.

After two weeks of trial, the court again requested instructions, and noted that the case was very complicated. Three defendants submitted their proposed instructions one week later. The instructions in issue here were submitted by Hamilton about nine weeks after they were ordered to be filed, five weeks after the court again requested them and one day before final arguments.

If requests for jury instructions are to be of real help to the trial court, they must be filed early enough to enable the court to fully consider them. Here the court had no such opportunity because the requests were not timely filed. It would not have been error for the court to have rejected them. *United States v. Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied sub nom. Burtman v. United States*, 400 U.S. 1020 (1971).

Appellants contend that if the court had informed them earlier that it would give these instructions, they would have argued the case differently. Even if that were true, appellants' own failure to timely file their requests was largely responsible for the situation about which they now complain. But the record shows that counsel fully argued the issues relating to the statute of limitations and concealment, the matters covered by the instructions. There was no prejudice here. *United States v. Pommerening*, 500 F.2d 92 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

*OTHER ISSUES*

We have studied all of the other claims of error. None of them have merit, and most of them are frivolous. The appellants had fair trials and the jury's verdicts were based on evidence establishing their guilt beyond all reasonable doubt.

AFFIRMED

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 14, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON, *District Judge**

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT and ERNEST HAMILTON,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Indiana Hammond Division.
No. H Cr 76 114 — Phil M. McNagny, Jr., Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this date.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, is sitting by designation.

# APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 31, 1978.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON,* *Senior District Judge*

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT and ERNEST HAMILTON,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114 — Phil M. McNagny, Jr., Judge.

## ORDER

Appellants filed petitions for rehearing calling attention to errors which were inadvertently included in the Court's opinion dated June 14, 1978.

To correct those errors, It Is Ordered that the opinion be amended as follows:

1. Delete from page 2: "He was appointed to that position by the mayor of East Chicago."

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

2. Delete, beginning on page 10, the paragraphs which start with "Appellants contend that because an Indiana sanitary district. . ." and "The Indiana legislature did not intend to create. . .".

3. Insert, in the place of the two paragraphs deleted beginning on page 10, the following:

> "Appellants contend that because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution, Leahu as Superintendent was not an employee of a political subdivision. There is no merit in this contention.
>
> "In *Archer* v. *City of Indianapolis*, 233 Ind. 640, 122 NE.2d 607, 610-611 (1954) the Court held that sanitary district bonds payable out of a special tax did not create indebtedness of the municipality served by the sanitary district. Nevertheless, the Court observed that the sanitary district functioned as an agency of the city. The sanitary district is under the control of a Board whose members are appointed and subject to removal by the mayor. The Board acts in the name of the City when it brings or defends an action and when it issues bonds.
>
> "We hold that as an employee of the Board, Leahu was an employee of the City and therefore a bribeable official under Indiana law."

The petitions for rehearing are otherwise denied.

On appellant Kovach's suggestion for rehearing en banc, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny a rehearing.

It Is Therefore Ordered that the suggestion for a rehearing en banc is rejected and the petitions for rehearing are denied.

The application to stay the mandate is denied, and the mandate shall issue forthwith.

# APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
Hammond Division

UNITED STATES OF AMERICA

*v.*

ERNEST R. HAMILTON, CHARLES W. SCHUBERT, CORNEL A. LEAHU, MELVIN C. WETTERLIN, CHARLES C. FITZGERALD, ALFRED KOVACH, and LAURANCE HINESLEY

NO. HCR 76-114
VIO.: Title 18, United States Code, Sections 371, 1341, 1952 and 1623

The SEPTEMBER 1975 GRAND JURY charges:

1. At all times pertinent to this indictment the East Chicago, Indiana, Board of Sanitary Commissioners, hereinafter referred to as Board, was a local government entity created, empowered, and organized under the laws of the State of Indiana and the code of the City of East Chicago, having appointed officials and employees empowered and authorized to administer the affairs of the Board.

2. At all times pertinent to this indictment, the Board nd its officials were empowered by law to contract for, direct, oversee and supervise the planning, design, construction, and certification of construction and expenditures, relating to sewage disposal plants, intercepting sewers and all appurtenances necessary or

useful and convenient for the collection and treatment, purification and disposal of liquid and solid waste and refuse of the Sanitary District.

3. During the time pertinent to this indictment defendant Cornel A. Leahu was employed by the Board as Superintendent of the East Chicago Sanitary District, hereinafter referred to as the District, and was responsible for conducting the operations of the District.

4. At all times pertinent to this indictment, Russell, Schubert, Hamilton and Associates, Inc., which became RSH Associates, Inc. on April 24, 1970, and is hereinafter referred to as RSH, Inc., was an Indiana corporation engaged in the business of providing architectural and engineering consulting services.

5. At all times pertinent to this indictment, defendants Ernest R. Hamilton and Charles W. Schubert were directors and owners of RSH, Inc. and conducted its affairs.

6. During the time pertinent to this indictment, Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. were Indiana corporations, engaged in the construction business.

7. During the time pertinent to this indictment, Miles A. Hernly was President and Director of Hernly Brothers, Inc. and conducted its affairs. Charles C. Fitzgerald was President and Director of Fitzgerald and Stutz, Inc. and conducted its affairs.

8. During the time pertinent to this indictment, defendant Melvin C. Wetterlin was owner and operator of Wetterlin Engineering Sales, Inc., an Indiana corporation, engaged in the busines of selling and designing

engineer control systems for industrial, municipal, and commercial installations.

9. During the time pertinent to this indictment Laurance Hinesley was a manufacturers representative for firms involved in the sale of waste-water treatment equipment.

10. At all times pertinent to this indictment, Title 35, Article 1, Chapter 90, Section 4, Indiana Revised Statutes, entitled: *Bribery of public officers—Corruption*—provided in pertinent part:

> Whoever corruptly gives, promises or offer(s) . . . to any employee of any municipal corporation, or political subdivision of this state . . . any money or valuable thing, or corruptly offers or promises to do any act beneficial to any such person, to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him; and whoever being . . . (an) employee of any municipal corporation or any political subdivision of this State, . . . either before or after his . . . qualification, appointment, or employment, solicits or accepts any such money, promise or valuable thing, to influence him with respect to his official duty, or employment, or to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him, shall be . . . (guilty of an offense).

11. At all times pertinent to this indictment, Title 35, Article 1, Chapter 90, Section 5, Indiana Revised Statutes, entitled: *Bribery of . . . township trustees . . . — Corruption*—provided in pertinent part:

> Whoever, with intent to corrupt a(n) . . . officer of any city, . . . either before or after he . . . (is) appointed, qualified or sworn, promises or offers him . . . any money or valuable thing; and whoever, either before or after he is . . . appointed, qualified

or sworn as an . . . officer of any city . . . solicits or accepts any money or other valuable thing to influence him with respect to the discharge of his duties as such, shall be (guilty of an offense).

12. At all times pertinent to this indictment, Title 35, Article 1, Chapter 101, Section 9, Indiana Revised Statutes, entitled: *Public contracts—Bribery of officer to procure*—provided in pertinent part:

> Any person or agent who shall pay or agree to pay any money, bonus, fee, commission, or deliver or give anything of value in any sum to the value of more than two hundred dollars ($200) to any . . . person holding any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana, for the purpose of procuring any contract for the construction of any . . . public work, or the furnishing of any material or performance of any work for the use of said state, over which said official has any authority or jurisdiction or whoever whether in person or by agent or the agent himself, shall obtain any such contract and shall thereafter pay or agree to pay any such person or officer any money, bonus, fee, commission, percentage, reward, drawback, premium, profit, or other thing of value in any sum to the value of over two hundred dollars ($200), . . . shall be (guilty of any offense).

13. At all times pertinent to this indictment, Title 18, Article 1, Chapter 2, Section 4, Burns Indiana Revised Statutes, entitled: *City contracts—Interest forbidden*—provided in pertinent part:

> No . . . employee of any city or incorporated town of this state, shall, either directly or indirectly, be a party to, or in any manner interested in, any contract or agreement, either with such city or incorporated town, or with any officer, board, clerk, deputy or employee of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by . . . any officer, board, clerk, deputy or employee of

> such city or incorporated town . . .; or any person violating any of such provisions shall be (guilty of an offense).

14 At all times pertinent to this indictment, Title 35, Article 1, Chapter 101, Section 7, Indiana Revised Statutes, entitled: *Officers interested in public contracts*— provided in pertinent part:

> Any . . . township or town trustee, (or) mayor, . . . or their appointees or agents, . . . or any person holding a lucrative office under the Constitution or laws of this State, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any . . . public building or work of any kind, erected or built for the use of . . . any county, township, town or city in the state, in which he excercises any official jurisdiction, or who shall bargain for or receive any . . . profit or money whatever, or any contract, . . . shall be guilty (of an offense), and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.

15. On or about April 11, 1966, The Board and RSH, Inc. entered into and executed a contract whereby RSH, Inc. was commissioned to make a survey and report on the needs for additions to the sewage works and sewage system of the City of East Chicago, Indiana, in order to assist in the abatement of domestic and industrial liquid waste pollution of Lake Michigan and the Grand Calumet River.

16. On or about August 7, 1967, the Board and RSH, Inc. entered into and executed a contract whereby RSH, Inc. would serve as the Board's professional representative in the planning and inspection of construction for the East Chicago Water Pollution Abatement Project; prepare the necessary project design

surveys, preliminary drawings and construction costs estimates; prepare project working drawings, specifications, and contract documents including performance and maintenance bonds; act as the Board's representative at the project site to issue instructions to the contractor and prepare change orders as required; safeguard generally the interests of the Board; determine the amounts owing to the contractors and approve in writing to the Board payments in those amounts; and perform such other duties on behalf of the Board as defined by the contract and provided for by law.

17. On or about September 22, 1969, the Board met and received bids for the East Chicago, Indiana, Water Pollution Abatement Project, Contract Number 67-5144, hereinafter referred to as sewer project, which sewer project was financed by sale of district bonds in the amount of seventeen million dollars ($17,000,000) on or about November 20, 1969.

18. On or about September 23, 1969, the Board met and tentatively awarded the sewer project contract to Hernly Brothers, Inc. at a cost of fourteen million, two hundred and eighty seven thousand, three hundred and fourteen dollars and forty cents ($14,287,314.40).

19. On or about January 12, 1970, a performance bond issued in the name of Hernly Brothers, Inc. was accepted by the Board, which performance bond was intended to insure satisfactory completion of the sewer project.

20. On or about January 5, 1970, the final contract for the sewer project was entered into and executed by and between Hernly Brothers, Inc. and the Board, whereby Hernly Brothers, Inc. became contractor for construction of the sewer project.

21. On or about September 1969, Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. agreed to perform the sewer project contract as a joint venture, which joint venture agreement subsequently was reduced to writing and made effective as of February 1, 1969.

22. From on or about April 11, 1966, up to and including the date of this indictment, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
CORNELL A. LEAHU,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD,
ALFRED KOVACH, and
LAURANCE HINESLEY

defendents herein, and Miles A. Hernly, named herein as co-conspirator but not as a defendant, unlawfully, knowingly and wilfully did combine, conspire, confererate and agree together, with each other and with other persons, to commit the following offenses against the United States:

(1) Devising a scheme and artifice:

(a) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District, of their right to have the District's business and its affairs conducted honestly, impartially, free from bribery, corruption, collusion, fraud, undue influence, dishonesty, conflict of interest, and in accordance with the laws of the State of Indiana;

(b) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District of their right to the conscientious, loyal, faithful, disinterested, and unbiased services of Cornel A. Leahu, Ernest R. Hamilton, and Charles W. Schubert, in the performance of acts related to their official duties, functions, and employment;

(c) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District, of certain secret monies obtained by and expended on behalf of Cornel A. Leahu, Ernest R. Hamilton, and Charles W. Schubert as a result of their positions and conduct as public officials and employees; and

(d) To obtain money and property by means of false and fraudulent pretenses and representations;

for the purpose of executing such scheme and artifice to knowingly and wilfully cause the United States mails to be used in furtherance of the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341.

(2) Traveling in interstate and foreign commerce and using the facilities in interstate and foreign commerce, including the mail with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery, in violation of the laws of Indiana, the state in which the bribery was committed, that is Burns Indiana Statutes, Title 35, Article 1, Chapter 90, Sections 4 and 5; and Title 35, Article 1, Chapter 101, Section 9, and thereafter performing acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the unlawful activity, in violation of Title 18, United States Code, Section 1952.

23. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Laurance Hinesley, would and did meet with Miles A. Hernly to discuss sewer project design, specifications, equipment, bids, and contracts, and would and did assist in the preparation of the bid submitted by Hernly Brothers, Inc. for construction of the sewer project.

24. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, to recommend Board acceptance of the Hernly Brothers, Inc. bid.

25. It was a part of the conspiracy that Cornel A. Leahu, Ernest R. Hamilton, Charles W. Schubert and Charles C. Fitzgerald, knowing that Underwriters Insurance Co., had not authorized any performance bond for Hernly Brothers, Inc., would and did prepare and cause to be prepared, a false and fraudulent performance bond which performance bond would appear to be issued to Hernly Brothers, Inc. by Underwriters Insurance Co. and which performance bond was a condition precedent to final Board acceptance of the Hernly Brothers, Inc. bid.

26. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Miles A. Hernly would and did agree to divide equally among themselves, the profits from the sewer project.

27. It was a part of the conspiracy that Alfred Kovach and Cornel A. Leahu would and did solicit one million dollars ($1,000,000) of sewer project funds which they represented would be for the benefit of East Chicago public officials.

28. It was a part of the conspiracy that one million dollars ($1,000,000) would be and was paid to, given over, and accepted by Cornel A. Leahu, which money derived from sewer project funds with Leahu's knowledge and consent, and which money was to be and was received and accepted by Cornel A. Leahu to influence him and others in the performance of official duties and

employment, and which payments Cornel A. Leahu was not authorized by law to accept.

29. It was a part of the conspiracy that approximately one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14) would be and was paid to, given over, and accepted by Elmer F. Layden, Jr., an independent insurance agent, as premium payments for the fraudulent performance bond.

30. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did submit and cause to be submitted to Hernly Brothers, Inc., invoices which purported to be for goods and services provided to the sewer project, knowing that these invoices would be paid from sewer project funds, which goods and services had been received by Ernest R. Hamilton and Charles W. Schubert for their personal benefit, and which goods and services were solicited, received and accepted by Earnest R. Hamilton and Charles W. Schubert to influence them in the performance of their duties and employment, and which goods, services and payments, they were not authorized to receive.

31. It was a part of the conspiracy that Laurance Hinesley would and did submit and cause to be submitted to Hernly Brothers, Inc., invoices which purported to be for goods and services provided to the sewer project, knowing that these invoices would be paid from sewer project funds, which goods and services were never provided to the sewer project, and which payments were received and accepted by Laurance Hinesley for his personal benefit.

32. It was a part of the conspiracy that Laurance Hinesley would be placed on the Fitzgerald and Stutz,

Inc. sewer project payroll from April 9, 1970 through March 25, 1971, and would and did receive approximately five hundred and forty dollars ($540) per week net salary, for which he performed no work.

33. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly each would and did become a 20% owner in Ingenieur Tiefbau, A. G., a Swiss corporation, hereinafter referred to as ITAG.

34. It was a part of the conspiracy that the ITAG stock would be held in trust in Switzerland for the benefit of Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly.

35. It was a part of the conspiracy that Hernly Brothers, Inc. would and did enter into a contract with ITAG, whereby Hernly Brothers, Inc. was obligated to pay ITAG eighty thousand dollars ($80,000) per month for a period of twenty-four months for engineering consulting services, which contract would serve as a pretext for transmittals of sewer project funds to ITAG, and which services were never performed or intended to be performed.

36. It was a part of the conspiracy that Hernly Brothers, Inc. would and did enter into a contract with ITAG, whereby Hernly Brothers, Inc. was obligated to pay ITAG thirty-five thousand dollars ($35,000) per month for a period of approximately nineteen months for welding equipment rental which contract would serve as a pretext for transmittals of sewer project funds to ITAG, and which equipment was never used or intended to be used in the construction of the sewer project.

37. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did cause invoices, documents, and correspondence to be placed in the United States mails and sent and delivered by the U.S. Postal Service to and from Hernly Brothers, Inc. and ITAG, which documentation was intended to and would appear to support transmittals of sewer project funds to ITAG as payment for services and rental as described in paragraphs 35 and 36 herein, and which documentation was intended to and did conceal the true purposes for these transmittals of sewer project funds to ITAG.

38. It was a part of the conspiracy that expenditures to ITAG pursuant to the service and rental contracts denoted to paragraphs 35 and 35 herein, would be and were utilized as follows:

(a) One million dollars ($1,000,000) to be returned to the United States in cash for payment to Cornel A. Leahu as denoted in paragraph 27 herein.

(b) One million dollars ($1,000,000) to be retained in Switzerland for payment of Hernly Brothers, Inc. United States taxes if payments to ITAG were disallowed by the Internal Revenue Service; and if not so expended, to be divided equally among Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly.

(c) Payment of management and accounting fees to Swiss managers.

(d) Remainder to be divided equally among Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly.

39. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and

did cause their ownership interest in ITAG and the true reasons for expenditures to ITAG, to be misrepresented to, and hidden and concealed from the Board and the citizens of the District.

40. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert and Laurance Hinesley would and did cause the true purposes for the payments pursuant to false invoices and payroll denoted in paragraphs 30 through 32 herein, to be misrepresented to, and concealed and hidden from the Board and the citizens of the District.

41. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, and that Cornel A. Leahu would and did utilize his position and influence as Superintendent of the District, to initiate, draft, promote, recommend, and approve the preparation, submission, and passage of certain change orders, which change orders would and did authorize expenditures of additional funds for sewer project construction, well knowing and intending that the additional funds so generated would be transmitted to ITAG pursuant to contracts outlined in paragraphs 35 and 36 herein, and utilized as outlined in paragraph 38 herein.

42. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, and that Cornel A. Leahu would and did use his position and influence as Superintendent of the District, to recommend, authorize and approve periodic estimates for partial payments from District funds to Hernly Brothers, Inc., well knowing that included in

these payments were expenditures for a fraudulent performance bond, and fraudulent payroll, invoices, billings and contracts as denoted in paragraphs 29 through 32, 35 and 36 herein, and which expenditures they knew were for their own personal benefit and the personal benefit of others.

43. It was a part of the conspiracy that Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. would and did enter into and execute an agreement with Basic Earth Science Systems, Inc., of Denver, Colorado, hereinafter referred to as BESSI, which agreement created a partnership known as Columbine I.

44. It was a part of the conspiracy that Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc., would and did invest approximately 3.2 million dollars of sewer project profits into Columbine I to be expended in the acquisition, exploration, development, operation and production of mineral properties.

45. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert each would and did receive an undivided one-half interest in an overriding royalty interest equal to 40% of the net operating profits in all properties owned and to be acquired by Columbine I.

46. It was a part of the conspiracy that the overriding royalty interest referred to in paragraph 45 herein, would be and was held in trust by Jordan R. Smith, then an officer of BESSI, for the benefit of Charles W. Schubert and Ernest R. Hamilton.

47. It was a part of the conspiracy that Ernest R. Hamilton, Charles C. Schubert, Melvin C. Wetterlin, Laurance Hinesley, and Miles A. Hernly would and did travel and use facilities in interstate and foreign

commerce, for the purpose of obtaining money for payment to public officials and employees.

48. In furtherance of the conspiracy and to effect the objects thereof, the conspirators committed the . . . (copy distorted) acts, among others:

(1) In or about J. . . (copy distorted) 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(2) In or about July . . . (copy distorted), Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had a conversation in Minneapolis - St. Paul, Minnesota.

(3) In or about September 1969, and prior to September 22, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin, Laurance A. Hinesley and Miles A. Hernly met and had conversations in Indianapolis, Indiana.

(4) In or about September 1969, Charles W. Schubert and Ernest R. Hamilton traveled to Zurich, Switzerland.

(5) In or about September 1969, Charles C. Fitzgerald, Melvin C. Wetterlin, Charles W. Schubert, Ernest R. Hamilton, Cornel A. Leahu, Alfred Kovach and Miles A. Hernly met and had conversations in Chicago, Illinois.

(6) On or about September 21, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had conversations in Hammond, Indiana.

(7) In or about October, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C.

Wetterlin, Laurance Hinesley and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(8) In or about November 1969, Cornel A. Leahu, Alfred Kovach and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(9) In or about December 1969, Cornel A. Leahu, Charles W. Schubert, Ernest R. Hamilton, Charles C. Fitzgerald and Melvin C. Wetterlin met in Hammond, Indiana, and prepared and caused to be prepared a fraudulent performance bond.

(10) In or about December 1969, Charles W. Schubert, Charles C. Fitzgerald, Cornel A. Leahu, Ernest R. Hamilton and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(11) From on or about January 2, 1970 to on or about January 7, 1970, Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly met in Zurich, Switzerland.

(12) On or about January 7, 1970, Miles A. Hernly, Charles C. Fitzgerald, Ernest R. Hamilton, Charles W. Schubert and Melvin C. Wetterlin met in Zurich, Switzerland and signed and executed a Mandate Agreement.

(13) On or about January 8, 1970, Miles A. Hernly met and had a conversation with Cornel A. Leahu in East Chicago, Indiana.

(14) In or about January 1970, Miles A. Hernly received by mail from Zurich, Switzerland a service contract between Hernly Brothers, Inc. and ITAG.

(15) In or about January 1970, Miles A. Hernly received by mail a performance bond premium invoice in the amount of one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14).

(16) From on or about February 28, 1970 to on or about October 26, 1970, Miles A. Hernly paid to Elmer F. Layden, Jr. of Northwest Insurance Agency, Chicago, Illinois one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14) for the performance bond premium.

(17) In or about February 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met in East Chicago, Indiana, and signed a document authorizing Miles A. Hernly to receive one hundred and five thousand dollars ($105,000) in cash from ITAG.

(18) On or about February 13, 1970, Miles A. Hernly flew to Zurich, Switzerland, paid one hundred and fifty thousand dollars ($150,000) to ITAG, and received one hundred and five thousand dollars ($105,000) in United States currency.

(19) On or about February 14, 1970, Miles A. Hernly met Cornel A. Leahu in Chicago, Illinois and gave Cornel A. Leahu one hundred and five thousand dollars ($105,000) in United States currency.

(20) On or about March 25, 1970 in Zurich, Switzerland, Miles A. Hernly paid ninety thousand dollars ($90,000) to ITAG and received seventy-five thousand dollars ($75,000) in United States currency.

(21) On or about March 26, 1970, in East Chicago, Indiana, Miles A. Hernly met with Cornel A. Leahu and gave Cornel A. Leahu seventy-five thousand dollars ($75,000) in United States currency.

(22) On or about April 20, 1970, Ernest R. Hamilton, representing RSH, Inc. recommended Board approval of Change Order No. 2, increasing the sewer project contract price by eight hundred and thirty thousand, six hundred and forty-six dollars and thirty cents ($830,646.30).

(23) On or about June 1, 1970, Robert Hamilton, Charles C. Fitzgerald, Charles W. Schubert, Alfred Kovach and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(24) On or about June 5, 1970, in Zurich, Switzerland, Miles A. Hernly paid ITAG three hundred and twenty thousand dollars ($320,000) and received one hundred and twenty-five thousand dollars ($125,000) in United States currency.

(25) On or about June 5, 1970, in Zurich, Switzerland, Miles A. Hernly and Charles W. Schubert negotiated a rental contract with ITAG, described herein in paragraph 35.

(26) On or about June 8, 1970, in Gary, Indiana, Miles A. Hernly gave Cornel A. Leahu one hundred and twenty-five thousand dollars ($125,000) in United States currency.

(27) On or about July 20, 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin, and Miles A. Hernly met and signed a document authorizing Ernest R. Hamilton to receive one hundred thousand dollars ($100,000) from ITAG.

(28) After July 20, 1970, and prior to August 17, 1970, Ernest R. Hamilton traveled to Amsterdam, Netherlands, and received one hundred thousand dollars ($100,000) in United States currency.

(29) On or about August 17, 1970, in East Chicago, Indiana, Ernest R. Hamilton gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(30) On or about August 17, 1970, in East Chicago, Indiana, Miles A. Hernly gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(31) On or about September 28, 1970, in East Chicago, Indiana, Miles A. Hernly mailed and caused to be mailed to Zurich, Switzerland, a check payable to ITAG in the amount of three hundred and fifty thousand dollars ($350,000).

(32) On or about September 28, 1970, in East Chicago, Indiana, Miles A. Hernly mailed and caused to be mailed to Zurich, Switzerland, a check payable to ITAG in the amount of eighty thousand dollars ($80,000).

(33) In or about September or October, 1970, Charles C. Fitzgerald, Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin and Miles A. Hernly met and signed a document authorizing Charles W. Schubert to receive two hundred thousand dollars ($200,000) from the ITAG funds.

(34) On or about October 19, 1970, Charles C. Fitzgerald and Melvin C. Wetterlin traveled to Zurich, Switzerland, and each received one hundred thousand dollars ($100,000) in United States currency.

(35) In or about late October 1970, Melvin C. Wetterlin met with Miles A. Hernly in Chicago, Illinois or East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(36) In or about late October 1970, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(37) In or about late October, 1970, Charles W. Schubert met with Miles A. Hernly in East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(38) In or about late October 1970, in East Chicago, Indiana Miles A. Hernly met with Cornel A. Leahu and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(39) On or about Decembver 11, 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, and Miles A. Hernly met and signed an authorization for Ernest R. Hamilton to receive two hundred and one thousand, five hundred dollars ($201,500) from the ITAG funds.

(40) In or about early January 1971, Ernest R. Hamilton met with Miles A. Hernly in East Chicago, Indiana, and gave Miles A. Hernly one hundred thousand dollars ($100,000) from the ITAG funds.

(41) In or about early January 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

42. In or about January, 1971, Miles A. Hernly met with an ITAG manager in East Chicago, Indiana and received from him one hundred thousand dollars from the ITAG funds.

(43) In or about January 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(44) In or about January 1971, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Miles A. Hernly and Jordan R. Smith, met and had a conversation in Denver, Colorado.

(45) On or about March 29, 1971, in Hammond, Indiana an ITAG representative gave Miles A. Hernly fifty thousand dollars ($50,000) in United States currency from the ITAG funds.

(46) On or about March 29, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu fifty thousand dollars ($50,000) in United States currency.

(47) On or about April 27, 1971, an ITAG representative met with Miles A. Hernly in East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) from the ITAG funds.

(48) On or about April 27, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(49) Between on or about April 5, 1971, and on or about December 28, 1971, Miles A. Hernly provided and caused to be provided to BESSI, nine payments totalling 3.2 million dollars.

(50) On or about June 24, 1971, in Highland, Indiana Miles A. Hernly received one hundred thousand dollars ($100,000) of the ITAG funds, from an ITAG representative.

(51) In or about June, 1971 or early July, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu forty-five thousand dollars ($45,000) in United States Currency.

(52) On or about July 16, 1971, Robert L. Hamilton, representing RSH, Inc., recommended Board approval of Change Order No. 5, increasing the sewer project contract price by twenty-eight thousand, eight hundred and forty-six dollars and sixty cents ($28,846.60).

(53) In or about October, 1971, Miles A. Hernly met and had a conversation with Charles W. Schubert in Indianapolis, Indiana.

(54) In October, 1971, Miles A. Hernly signed an authorization for Ernest R. Hamilton to receive an accounting of all ITAG funds in Zurich, Switzerland.

(55) In October, 1971, Ernest R. Hamilton traveled to Zurich, Switzerland.

(56) In November, 1971, Laurance Hinesley traveled to Zurich, Switzerland, and received thirty-five thousand dollars ($35,000) from the ITAG funds.

(57) In or about November, 1971, Laurance Hinesley gave twenty-five thousand dollars ($25,000) to Charles W. Schubert.

(58) On or about January 20, 1972, Miles A. Hernly mailed and caused to be mailed to ITAG, Brig, Switzerland, a letter stating the intention of Hernly Brothers, Inc. to pay ITAG twenty thousand dollars ($20,000) for consulting services for the last six months of 1971.

(59) On or about February 18, 1972, Miles A. Hernly mailed and caused to be mailed to ITAG, Brig, Switzerland, a letter agreeing to pay ITAG thirty thousand dollars ($30,000) for the earlier dissolution of the consulting contract upon receipt of final payment on the East Chicago sewer project.

(60) On or about May 31, 1972, Ernest R. Hamilton conveyed his undivided one-half interest in the 40% net operating profits in Columbine I properties to BESSI, and received from BESSI a promissory note in the amount of one million, ninety thousand, nine hundred and thirty dollars ($1,090,903.00).

(61) On or about May 31, 1972, Charles W. Schubert conveyed his undivided one-half interest in the 40% net operating profits of Columbine I properties to BESSI, and received from BESSI a promissory note in the

amount of one million, one hundred and sixty-five thousand, six hundred and sixty-eight dollars ($1,165,668.00), which included payment of one million, ninety thousand, nine hundred and thirty dollars ($1,090,930.00) for his interest in the Columbine I properties.

(62) On or about March 9, 1973, Ernest R. Hamilton, Charles W. Schubert and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(63) On or about August 28, 1973, Ernest R. Hamilton signed a change order approving final sewer project changes to be performed by Hernly Brothers, Inc.

(64) The Grand Jury realleges and incorporates by reference the allegations contained in Counts Two through Seven of this indictment, each of which counts is alleged as a separate and distinct overt act.

All in violation of Title 18, United States Code, Section 371.

## COUNT II

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through twenty-one of Count I of this indictment are realleged and incorporated by reference.

2. From on or about August 7, 1967, until on or about the date of the return of this indictment, in the Northern District of Indiana, Hammond Division, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
CORNEL A. LEAHU,
MELVIN C. WETTERLIN, and
CHARLES C. FITZGERALD,

defendants herein, and Miles A. Hernly, named herein but not as a defendant, and others, devised and intended to devise a scheme and artifice:

(a) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District of their right to have the District's business and its affairs conducted honestly, impartially, free from bribery, corruption, collusion, fraud, undue influence, dishonesty, conflict of interest, and in accordance with the laws of the State of Indiana.

(b) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Cornel A. Leahu, Ernest R. Hamilton and Charles W. Schubert, in the performance of acts related to their official duties, functions, and employment.

(c) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District, of certain secret monies obtained by and expended on behalf of Cornel A. Leahu, Ernest R. Hamilton and Charles W. Schubert, as a result of their positions and conduct as public officials and employees; and

(d) To obtain money and property by means of false and fraudulent pretenses and representations.

3. This scheme and artifice is fully described in paragraphs 23 through 47 of Count I of this indictment and incorporated herein by reference as if set out in full; said objects of the Count I conspiracy being parts of the scheme and artifice to defraud in violation of Title 18, United States Code, Section 1341.

4. On or about October 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, an invoice of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A., for the October 1971 welding equipment rental in the amount of thirty-five thousand dollars ($35,000.00).

In violation of Title 18, United States Code, Section 1341.

## COUNT III

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about November 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, two invoices of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana U.S.A. for the November 1971 welding

equipment rental in the amount of thirty-five thousand dollars ($35,000); and the October 1971 technical service fee in the amount of seventy-two thousand, six hundred dollars ($72,600).

In violation of Title 18, United States Code, Section 1341.

COUNT IV

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about December 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, two invoices of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. for the December 1971 welding equipment rental in the amount of thirty-five thousand dollars ($35,000.00), and the November 1971 technical service fee in the amount of seventy-one thousand, two hundred dollars ($71,200.00).

In violation of Title 18, United States Code, Section 1341.

## COUNT V

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about January 3, 1972, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, an invoice of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. for the December 1971 technical service fee in the amount of eighty-one thousand, eight hundred dollars ($81,800.00).

In violation of Title 18, United States Code, Section 1341.

## COUNT VI

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about January 4, 1972, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, a letter from ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. proposing to terminate the contract for consulting services at the end of the year 1971.

In violation of Title 18, United States Code, Section 1341.

## COUNT VII

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through twenty-one of Count I of this indictment are realleged and incorporated by reference.

2. In October, 1971, more specific date being unknown to the Grand Jury, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES A. SCHUBERT,
CORNEL A. LEAHU,
MELVIN C. WETTERLIN, and
CHARLES C. FITZGERALD,

defendants herein, unlawfully, wilfully and knowingly, with intent to promote, manage, carry on and facilitate the promotion, management and carrying on of an unlawful activity, that is bribery, in violation of the laws of the State of Indiana, in which state the bribery was committed, that is Burns Indiana Statutes, Title 35, Article 1, Chapter 90, Sections 4 and 5; and Title 35, Article 1, Chapter 101, Section 9, did cause Ernest R. Hamilton to travel in interstate and foreign commerce between Zurich, Switzerland, and the Northern District of Indiana, and thereafter the defendants did perform and cause to be performed acts to promote, manage, carry on and facilitate the promotion, management, and carrying on of the unlawful activity;

In violation of Title 18, United States Code, Sections 2 and 1952.

## COUNT VIII

The SEPTEMBER 1975 GRAND JURY further charges:

1. From in or about August 1967, until in or about the date of the return of this indictment, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, and Miles A. Hernly, named herein as co-conspirator but not as a defendant, unlawfully, knowingly and wilfully did combine, conspire, confederate and agree together, with each other and with other persons, to defraud the United States of America, by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue

Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes under the following circumstances, manner and means:

2. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did perform and cause to be performed the acts contained in paragraphs 26 through 40 of Count I of this indictment, which acts are incorporated by reference as parts of the conspiracy alleged herein as Count VIII.

3. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Miles A. Hernly would and did cause the false and fraudulent payments from sewer project funds to ITAG, denoted in paragraphs 35 and 36 of Count I of this indictment, to be deducted as business expenses from the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture books and records, and Form 1065 United States Partnership Income tax returns for calendar years 1970, 1971 and 1972.

4. It was a part of the conspiracy to defraud that payments to ITAG from the sewer project funds, would be and were utilized as a source of tax free money for payment to Cornel A. Leahu as denoted in paragraph 28 of Count I of this indictment.

5. It was a part of the conspirary to defraud that payments to ITAG from the sewer project funds would be utilized as a source of tax free money for the personal benefit of Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly as described in paragraphs 38b through 38d of Count I of this indictment.

6. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did cause the payments pursuant to false invoices denoted in paragraphs 30 through 32 of Count I of this indictment to be utilized for the tax-free personal benefit of Ernest R. Hamilton, Charles W. Schubert, and Laurance Hinesley, and would and did cause these payments to be deducted as legitimate business expenses from the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture books and records, and Form 1065 United States Partnership Income Tax Returns for calendar years 1970, 1971 and 1972.

7. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert and Charles C. Fitzgerald, each would and did file false Form 1040 Joint Federal Income Tax returns for calendar years 1970, 1971 and 1972; and that Cornel A. Leahu would and did file false Form 1040 Joint Federal Income Tax returns for calendar years 1970 and 1971.

8. The overt acts in furtherance of and to effect the objects of this conspiracy are fully described in paragraph 48 of Count I of this indictment and are incorporated herein by reference as if set out in full; said overt acts of the Count I conspiracy being overt acts of the conspiracy charged herein as Count VIII. In addition the conspirators committed the following overt acts, among others:

(a) On or about March 15, 1971, Miles A. Hernly signed Form 1065, 1970 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture.

(b) On or about April 10, 1971, Ernest R. Hamilton signed his 1970, Form 1040 Joint Federal Income Tax Return which 1970 Tax Return was subsequently

amended by Amended Form 1040 Tax Return for calendar year 1970, signed by Ernest R. Hamilton on or about March 20, 1972 and April 11, 1974.

(c) On or about April 14, 1971, Charles W. Schubert signed his 1970, Form 1040 Joint Federal Income Tax Return which 1970 Tax Return was subsequently amended by Form 1040X, signed by Charles W. Schubert on or about April 12, 1974.

(d) On or about April 10, 1971, Charles C. Fitzgerald signed his 1970 Form 1040 Joint Federal Income Tax Return.

(e) On or about March 22, 1971, Cornel A. Leahu signed his 1970 Form 1040 Joint Federal Income Tax Return.

(f) On or about April 12, 1972, Miles A. Hernly signed Form 1065, 1971 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc., joint venture.

(g) On or about April 17, 1972, Ernest R. Hamilton signed his 1971 Form 1040 Joint Federal Income Tax Return.

(h) On or about April 14, 1972, Charles W. Schubert signed his 1971 Form 1040 Joint Federal Income Tax Return.

(i) On or about April 17, 1972, Charles C. Fitzgerald signed his 1971 Form 1040 Joint Federal Income Tax Return.

(j) On or about April 13, 1972, Cornel A. Leahu signed his 1971 Form 1040 Joint Federal Income Tax Return.

(k) On or about April 16, 1973, Miles A. Hernly signed Form 1065, 1972 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture.

(l) On or about April 10, 1973, Ernest R. Hamilton signed his 1972 Form 1040 Joint Federal Income Tax Return.

(m) On or about April 16, 1973, Charles W. Schubert signed his 1972 Form 1040 Joint Federal Income Tax Return.

(n) On or about February 25, 1973, Charles C. Fitzgerald signed his 1972 Form 1040 Joint Federal Income Tax Return.

In violation of Title 18, United States Code, Section 371.

## COUNT IX

The SEPTEMBER 1975 GRAND JURY further charges:

1. On October 9, 1975, at Hammond, Indiana, in the Northern District of Indiana,

ALFRED KOVACH

defendant herein, while under oath as a witness before the September 1975 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Indiana, in a case then and there pending before the Grand Jury did knowingly make material false declarations.

2. At the time and place aforesaid, the Grand Jury was conducting investigations into possible violations of the criminal laws of the United States including among others, Sections 1341, 1952 and 371 of Title 18, United States Code.

3. During the course of the Grand Jury investigation, it became and was a matter material for the Grand Jury to determine whether the defendant Alfred Kovach had travelled in interstate commerce to attend a meeting in which payment of monies to public officials was discussed; whether he had knowledge of or had participated in

a scheme to divert money from the East Chicago Pollution Abatement Project for public officials; whether he was present during a conversation in which payments of money for East Chicago politicians was discussed; and whether he had discussed the diversion of money from the East Chicago Pollution Abatement Program with Charles W. Schubert, Ernest R. Hamilton, Miles A. Hernly, Charles C. Fitzgerald or Cornel A. Leahu.

4. At the time and place aforesaid, defendant Alfred Kovach, while under oath, knowingly did declare before the Grand Jury with respect to the aforementioned material matter that he had never travelled in interstate commerce to attend a meeting in which payment of monies to public officials was discussed; that he had no knowledge of and had not participated in a scheme to divert money for public officials from the East Chicago Pollution Abatement Project; that he was not present during a conversation in which payments of money for East Chicago politicians was discussed; and that he had not discussed the diversion of money from the East Chicago Pollution Abatement Program with Charles W. Schubert, Ernest R. Hamilton, Miles A. Hernly, Charles C. Fitzgerald and Cornel A. Leahu.

The aforesaid declarations by the defendant were false and were known by him to be false when made, because in or about September or October 1969, the defendant Alfred Kovach travelled to Chicago, Illinois to attend a meeting with Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, Cornel A. Leahu and Miles A. Hernly at which time the division of monies from the East Chicago Pollution Abatement Program for East Chicago public officials was discussed; and because the defendant Alfred Kovach knew of a scheme to divert money for public officials from the East Chicago Pollution Abatement Project.

In violation of Title 18, United States Code, Section 1623.

## COUNT X

The SEPTEMBER 1975 GRAND JURY further charges:

1. On October 9, 1975, at Hammond, Indiana, in the Northern District of Indiana,

MELVIN C. WETTERLIN,

defendant herein, while under oath as a witness before the September 1975 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Indiana in a case then and there pending before the Grand Jury did knowingly make material false declarations.

2. At the time and place aforesaid, the Grand Jury was conducting investigations into possible violations of the criminal laws of the United States including among others, Sections 1341, 1952 and 371 of Title 18, United States Code.

3. During the course of the Grand Jury investigation, it became and was a matter material for the Grand Jury to determine whether the defendant Melvin C. Wetterlin had discussed with contractors, public officials or others the payment of money as a bribe or kickback; whether he had traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; whether he had knowledge of or had participated in a plan to divert money from the East Chicago Pollution Abatement Project for pagment to public officials and others; and whether he had participated in a scheme by which shell corporations were utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project

and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; whether he was ever a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and whether there was any purpose for his meeting with representatives of ITAG in Zurich, Switzerland other than seeking to represent a German equipment supplier in the United States.

4. At the time and place aforesaid, defendant Melvin C. Wetterlin while under oath, knowingly did declare before the Grand Jury that he had never discussed with contractors, public officials or others the payment of money as a bribe or kickback; that he had not traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; that he had no knowledge of and had not participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others; that he had not participated in a scheme by which a shell corporation was utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; that he was never a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and that the only reason for his meeting with representatives of ITAG in Zurich, Switzerland was to seek to represent a German equipment supplier in the United States.

The aforesaid declarations by the defendant were false and known by him to be false when made because from in or about September 1969 up to and including October 9, 1975, the defendant Melvin C. Wetterlin had discussed the payment of money as a bribe or kickback with contractors, public officials, and others; he had traveled in

interstate and foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; he had knowledge of and had participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others, which scheme utilized a shell corporation of which he was a stockholder; and he had met with representatives of ITAG in Zurich, Switzerland for reasons other than seeking to represent a German equipment supplier in the United States.

In violation of Title 18, United States Code, Section 1623.

A TRUE BILL

FOREMAN

JOHN R. WILKS
United States Attorney

## Appendix 5

*19-2-14-1* [*48-4201*]. *Department of public sanitation in certain cities.*—In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof [18-2-1-1], there is hereby created a department of three [3] members, to be known as the board of sanitary commissioners, two [2] of whom shall be appointed by the mayor of such city of the first class and the third shall be the city civil engineer of such city, who shall be a member by virtue of his office. The member first appointed shall serve for a term of four [4] years from January 1, 1917, and the second member appointed hereunder shall serve for a term of three [3] years from January 1, 1917, and their successors shall be appointed for terms of four [4] years each. Each member of such board of sanitary commissioners before entering upon his duties shall take and subscribe the usual oath of office, to be indorsed upon the certificate of his appointment, which he shall file with the city clerk. Each member shall execute a bond payable to the state of Indiana with surety acceptable to the mayor of said city in the penal sum of five thousand dollars [$5,000], conditioned upon his performance of the duties of his office as required by law, and the faithful accounting for all moneys and property that may come into his hands or under his control. At the expiration of the respective terms of the members of such board so appointed, the mayor shall appoint successors to membership on such board, such succeeding members to be nominated in the method and by the same authorities as herein provided for nominating the first members of such board. All vacancies shall be filled by appointment by the mayor. Any commissioner may be removed from office by the mayor for neglect of duty or incompetency, but only after a hearing upon written charges preferred against such commissioner. Such

charges may be filed with the mayor, and the commissioner against whom the same are directed shall have at least ten [10] days' notice of the time and place of hearing thereon, and shall have opportunity to produce evidence and examine and cross-examine witnesses. All testimony shall be given under oath. The finding of the mayor shall be reduced to writing by him and filed with the city clerk. If such charges are sustained and such commissioner removed, he may take an appeal from such finding within ten [10] days after the date of filing of the same with the clerk, to the circuit or superior court of the county in which such city is located. He shall, in said court, file an original complaint against such mayor, setting forth the charges preferred and the finding made thereon. Such court shall hear the matter of such appeal within thirty [30] days after the filing of same without the intervention of a jury, and shall ratify or reverse the finding of said mayor, and the judgment of said court shall be final, and no appeal shall lie therefrom. [Acts 1917, ch. 157, § 1, p. 573; 1961, ch. 262, § 1, p. 591.]

*19-2-14-32* [*48-4227*]. *Cities of second class—Application of act.*—This act [19-2-14-1—19-2-14-32] and all acts amendatory thereof and all acts supplemental thereto, including chapter 236 of the Acts of the General Assembly of 1955 [19-2-21-1] shall apply to all cities of the second class which shall adopt the same by ordinance duly passed by the common council thereof as though cities of the second class were also mentioned wherever cities of the first class are mentioned in this act: Provided, however, That

(a) One member of such board of sanitary commissioners to be appointed by said mayor shall serve for a term of four [4] years from the first day of January next preceding the date of the adoption of this act by such city.

(b) The second member appointed by the mayor as provided in section 1 [19-2-14-1] of this act shall serve for a term of three [3] years from the first day of January next preceding the date of the adoption of this act by such city.

(c) The members of such board of sanitary commissioners of such city of the second class shall hold a meeting for the purpose of organization as provided for in section 2 [19-2-14-2] of this act, not later than six [6] months after the date of the adoption of this act by such city.

(d) The first report of such board to the mayor of such city of the second class provided for in said section 2 [19-2-14-2] of this act shall cover the period from the date of organization of such board to the first day of January next succeeding such date of organization.

(e) The words "a system of sewage disposal," "a system for the disposal of the sewage and drainage of such territory" and "sewage disposal plant or plants," as used in this act, shall be construed to mean and include one or more such systems or plants as may be deemed to be necessary by such board of sanitary commissioners.

(f) The powers herein granted to such board of sanitary commissioners of such city of the second class as shall adopt this act, and of such city of the second class, shall be cumulative to the powers now granted by any other law to them or either of them. [Acts 1917, ch. 157, § 26b, as added by Acts 1961, ch. 262, § 3, p. 591.]

*19-2-14-7* [*48-4205*]. *Sanitary district—Inclusion of additional territory—Remonstrances.*—Upon taking effect of this act [March 9, 1917] all the territory included at any time within the corporate limits of any such city and all the territory of any incorporated town lying within the corporate boundaries of any such city and any territory, town, addition or platted subdivision, or unplatted lands, lying outside the corporate limits of any such city, which have been taken into the sanitary district of such city, in accordance with the provisions of any prior act, or any territory incorporated into such district at any time under the provisions of any other act, now or hereafter in effect, and the sewage or drainage of which discharges into or through the sewage system of such city, shall become and

constitute a sanitary district for the purpose of providing for the sanitary disposal of the sewage of such district in such manner as to protect the public health and prevent the undue pollution of rivers, streams and watercourses and other waters, and thereafter said sanitary district, as so constituted, shall be deemed duly established under and subject to the provisions of this act [19-2-14-1—19-2-14-32].

Upon request, by a resolution adopted by the common council of any other city, or by the board of trustees of any town, or by the application in writing of the majority of the resident freeholders in a platted subdivision, or of the owners of any unplatted lands not within the boundaries of an incorporated city or town, and which city, town, platted subdivision, or unplatted lands, is or are located within the county in which any such city is situated, said board of sanitary commissioners, by adopting a resolution therefor, may incorporate all, or any portion of, the area of such city, town, platted subdivision, or unplatted lands, into said sanitary district. Any such request or application shall be signed and certified as correct by the secretary of the common council, or board of trustees, or resident freeholders, or landowners making the same and the original thereof shall be preserved in the records of said board of sanitary commissioners. Such resolution of said board, so incorporating any such area in the sanitary district, shall be in writing and an accurate description of the area so incorporated into the district shall be set out therein. A certified copy of such resolution, signed by the president and secretary of the board, together with a map showing the boundaries of such district and the location of such additional areas, shall be delivered to the auditor of the county within which such district is located and shall be properly indexed and kept in the permanent records of the offices of such auditor.

Further, upon request by ten [10] or more interested resident freeholders, in any such aforesaid platted or unplatted territory, said board of sanitary commissioners

may define the limits of an area, within the county and including the property of said requesting freeholders, which is to be considered as a unit for inclusion, then or thereafter, into said sanitary district. Notice of the defining of such unit or area by said board, and notice of the location and limits thereof, shall be given by one [1] publication in a newspaper of general circulation, published in the English language, in such city. Thereafter, and upon request, in the manner provided above, by a majority of the resident freeholders in said area, the same may be incorporated into said sanitary district. The resolution of the board so incorporating such area into said sanitary district and a map thereof shall be made and filed in the aforesaid manner.

The board of sanitary commissioners, of its own initiative, whenever any territory, by its contour and watershed, or by reason of the extension of any sewers by such city, or by any department thereof, is capable of draining sewage into or connecting with said sanitary system, may incorporate any or all of such territory, whether platted or unplatted, into such sanitary district by adopting a resolution to that effect, describing the reason it is to be so included, and a certified copy of such resolution shall be conclusive evidence in any proceeding that the territory therein described was so properly incorporated and constitutes a part of said sanitary district, subject to the provisions hereinafter set forth. Immediately after the passage of such resolution a notice of the same shall be published once each week for two [2] consecutive weeks in a daily newspaper of general circulation published in the English language in any such city, and shall state the time and place for a public hearing thereon, at a time not earlier than fifteen [15] days from the date of the first publication. On or before the date and time of such hearing anyone affected may file in the office of such board a written remonstrance to having his lands so included. The board shall either confirm, modify, or rescind such resolution at or following such hearing. An appeal may be taken from such decision by one or more persons deeming them-

selves aggrieved or injuriously affected, Provided those so appealing have filed such written remonstrances, as above provided, by filing their complaint therefor within thirty [30] days after the final decision of such board. Such appeal shall be governed by the general provisions therefor of the Acts of 1933, chapter 245 [18-5-17-1—18-5-17-9], and of any acts amendatory thereof or supplemental thereto, including the following further provisions of this section. If the court should be satisfied upon the hearing of such appeal that less than 75% of the persons owning property in the territory sought to be so incorporated in such sanitary district have remonstrated, and that the incorporation of such territory into the sanitary district of such city will be for its interest and will cause no manifest injury to the persons owning property in such territory, and the court shall so find and adjudge, said incorporation shall take place. If the court shall be satisfied that 75% or more of the persons owning property in the territory sought to be so incorporated have remonstrated, then such incorporation shall not take place, unless the court shall further find from the evidence that unless so incorporated, the health and welfare of residents of such territory, or of adjoining lands, will be materially affected and that the safety and welfare of the inhabitants and property thereof, and of other persons and property will be endangered, in which event the court may adjudge that such incorporation shall take place, notwithstanding the remonstrances. Pending such appeal and during the time within which such appeal may be taken such territory sought to be so incorporated shall of such appeal the judgment shall particularly describe the resolution of such appeal the judgment shall particularly describe the resolution [sic] upon which the appeal is based and it shall be the duty of the county clerk forthwith to deliver a certified copy of such judgment to the secretary of the board of sanitary commissioners, who shall record the same in the minute book of the board and make a cross-reference to the page thereof upon the margin where such original resolution was recorded. In case a decision is adverse to

such an incorporation, no further proceedings shall be taken by the board to incorporate any such territory within the sanitary district for a period of one [1] year after the rendition of such judgment.

This section shall be deemed supplemental to all other similar provisions in any other statute, and shall provide an additional or an alternative method of effecting any such changes in such aforesaid sanitary district. Whenever any bonds of such sanitary district are outstanding and until fully paid, all property included within any such district at the time such bonds were issued and sold shall remain subject to taxes levied thereon and for its proportion of such indebtedness until all such bonds are fully paid, notwithstanding any of such property and territory may have been at any time, after the issuance of such bonds, disannexed from such district. Any property and territory, so added to such district at any time shall, as a condition of the special benefits it thereby receives, become henceforth liable for its proportion of all taxes levied thereon to pay any and all bonds of such tax district which are either then outstanding, or are thereafter issued and sold. Such proportion of taxation shall be determined in the same manner as when any territory is annexed to a city, and the applicable statutes thereon are here included by this reference thereto. [Acts 1917, ch. 157, § 5, p. 573; 1943, ch. 107, § 2, p. 332; 1949, ch. 256, § 2, p. 864; 1961, ch. 26, § 1, p. 51.]